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Attorneys for eTreppid Technologies, LLC and Warren Trepp

**UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT COURT OF NEVADA**

DENNIS MONTGOMERY, an individual; and  
MONTGOMERY FAMILY TRUST, a California  
Trust,

Plaintiff,

vs.

ETREPPID TECHNOLOGIES, L.L.C., a Nevada  
Limited Liability Company; WARREN TREPP,  
an individual; DEPARTMENT OF DEFENSE of  
the UNITED STATES OF AMERICA, and  
DOES 1 through 10,

Defendants

\_\_\_\_\_  
AND RELATED CASE(S)

Case No. 3:06-CV-00056-PMP-VPC  
**Base File**

3:06-CV-00145-PMP-VPC

**ETREPPID TECHNOLOGIES, L.L.C.**  
**AND WARREN TREPP'S MOTION**  
**FOR SANCTIONS**

eTreppid Technologies, L.L.C. and Warren Trepp (hereinafter collectively referred to as  
“eTreppid”), by and through their counsel Hale Lane Peek Dennison and Howard, hereby submit their  
Motion for Sanctions.

This Motion is supported by the following Points and Authorities.

**POINTS AND AUTHORITIES**

**I. INTRODUCTION**

On February 21, 2008, after hearing several hours of argument on eTreppid's February 15, 2008 Motion to Compel and Montgomery's Opposition thereto, this Court ordered that Montgomery produce a number of documents requested in eTreppid's First and Second sets of Requests for Production of Documents. For example, this Court ordered that Montgomery provide:

- All of Montgomery's tax returns for 1998 through 2005.
- All documents relating to loans made by Trepp, or any entity that Montgomery understood to be controlled by Trepp, to Montgomery.
- Documents relating to eTreppid's technology, including white papers, power point presentations marketing documents, and correspondence with potential customers.
- Documents relating to any attempt by Montgomery to license, sell, or distribute any technology in the fields of data compression, pattern recognition, object tracking, or anomaly detection, between January 18, 2006 (when Montgomery was terminated from eTreppid) and the present.
- Documents that Montgomery provided to the Wall Street Journal, as well as any other reporters or media organizations, discussing or referring to Trepp, eTreppid, or Jim Gibbons.
- Photocopies of the faces of all CDs seized during the FBI's March, 2006 search of Montgomery's home and storage units.
- Where any CD seized by the FBI is marked as an eTreppid CD, a copy of the CD.

This Court ordered that Montgomery produce the subject documents on or before March 14, 2008. On March 6, 2008, Montgomery filed his Objection to the Magistrate Judge's February 21, 2008 Order. However, Montgomery did not obtain a stay of that Order prior to the March 14 date by which production was required. On March 19, 2008, this Court entered an order affirming the Magistrate's February 21, 2008 Order.

On March 14, 2008, Montgomery provided documents numbered DM 888 through DM 906. A true and correct copy of the letter enclosing these documents is attached hereto as **Exhibit 1**. These

documents included two letters purporting to transfer an interest in certain copyrights to Montgomery and photocopies of the faces of 31 CDs. On March 17, after receiving this inadequate document production, counsel for eTreppid enquired as to whether Montgomery intended to produce any further documents at the present time. Counsel for Montgomery indicated that Montgomery would not be producing additional documents. A true and correct copy of a letter confirming this conversation is attached hereto as **Exhibit 2**. In a subsequent email message, Montgomery's counsel has suggested that, in fact, it may provide additional documents. However, counsel has refused to identify what additional documents are to be produced or when such production will be made. A true and correct copy of an eMail in which Montgomery's counsel declines to provide such information is attached hereto as **Exhibit 3**.

By failing to provide documents that he was ordered to produce, Montgomery has willfully, and without excuse, disregarded this Court's February 21, 2008 Order. Montgomery's refusal to comply with this Court's order by providing the subject information is nothing more than yet another blatant attempt to avoid a resolution of this matter on the merits. There is no basis or justification for Montgomery's refusal to provide the information in a timely manner. Accordingly, eTreppid respectfully requests that this Court sanction Montgomery for this non-compliance.

## **II. ARGUMENT**

### **A. Montgomery Should Be Sanctioned For Willfully Failing to Provide Court-Ordered Discovery**

Fed. R. Civ. P. 37(b) provides that "if a party or a party's officer, director, or managing agent . . . fails to obey an order to provide or permit discovery. . . the court where the action is pending may issue further just orders." These further orders may include "prohibiting the disobedient party from supporting or opposing designated claims or defenses," or "striking pleadings in whole or part." Fed. R. Civ. P. 37(b)(2)(ii) and (iii). In addition, the Court may order that "the disobedient party, the attorney advising that party, or both to pay reasonable expenses, including attorney's fees, caused by the failure."

Here, Montgomery has refused to provide all but a handful of the documents that he is required to provide pursuant to this Court's February 21, 2008 Order. Montgomery has been unable to state

whether or when he will provide documents in compliance with that Order. Montgomery has not offered any excuse for his refusal to comply with this order. Accordingly, eTrepidid respectfully requests that this Court impose sanctions as allowed under Fed. R. Civ. P. 37.

**B. Montgomery's Complaint and His Answer to eTrepidid's Counterclaim Should Be Stricken**

The Ninth Circuit has held that terminating sanctions may be appropriate where a party has acted with "willfulness, bad faith, and fault" in failing to comply with a court order requiring discovery. *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9<sup>th</sup> Cir. 2007). In determining whether terminating sanctions are appropriate, the Court should consider five factors:

- The public's interest in expeditious resolution of litigation;
- The court's need to manage its dockets;
- The risk of prejudice to the party seeking sanctions;
- The public policy favoring disposition of cases on their merits; and
- The availability of less drastic sanctions.

*Id.*

In the present case, these factors strongly militate in favor of the imposition of terminating sanctions. This case was initiated in January 2006. Since that time, Montgomery has provided virtually no meaningful discovery responses and has provided only a small handful of non-public documents. Even though the discovery stay was lifted in November 2007, Montgomery still has not produced any of the key documents in this case, including the text of the software that he claims to have copyrighted. Given this background of deliberate delay in the discovery process, Montgomery's outright refusal to comply with this Court's order of February 21, 2008 is clearly just one more attempt to delay the expeditious resolution of this litigation.

The second factor also militated in favor of imposing terminating sanctions on Montgomery. This Court has devoted a tremendous amount of time to this case already. Indeed, Magistrate Cooke has held monthly status conferences to encourage the expeditious resolution of discovery disputes. The February 21, 2008 order requiring Montgomery to produce documents in response to eTrepidid's

1 discovery demands was issued as a result of one such status conference. By willfully disregarding that  
2 order, Montgomery has demonstrated a certain contempt for the effort that this Court is devoting to the  
3 management of this case. Thus, Montgomery's refusal to comply with this Court's February 21, 2008  
4 order undermines this Court's ability to manage its docket.

5 Montgomery's refusal to provide the requested documents causes significant prejudice to  
6 eTreppid. Montgomery has simply failed to provide virtually any documents which relate to his and  
7 eTreppid's respective claims and defenses. Even though the discovery cut-off in this matter is rapidly  
8 approaching, eTreppid has been utterly unable to evaluate the extent to which documents in  
9 Montgomery possession, custody, and control relate to the facts at issue in this case. eTreppid has  
10 been unable to prepare to depose relevant witnesses because Montgomery has refused to provide  
11 documents needed to prepare for such depositions. In particular, eTreppid has been unable to  
12 thoroughly evaluate the following issues because Montgomery has refused to provide the ordered  
13 discovery:

- 14 • eTreppid has been unable to evaluate Montgomery's assertion that he was not an  
15 employee of eTreppid because Montgomery has not provided tax returns which may  
16 shed light on this issue.
- 17 • eTreppid has been unable to conduct discovery as to its claim for misappropriation of  
18 trade secret because Montgomery has refused to provide documents evidencing his  
19 communications with his current employers, which may very well support eTreppid's  
20 claims.
- 21 • eTreppid has been unable to evaluate Montgomery's claim that he owns the technology  
22 at issue because Montgomery has refused to provide not only the source code for the  
23 subject technology, but he has also failed to provide any other documents in his  
24 possession which may describe the subject technology.

25 The fourth factor, the policy of deciding cases on their merits, likewise militates in favor of the  
26 imposition of terminating sanctions. Montgomery's refusal to meaningfully participate in the  
27 discovery process has made a resolution of this case on the merits virtually impossible. As set forth  
28 above, Montgomery continues to refuse to provide information that is absolutely necessary to the

1 ultimate trial of this matter.

2 Finally, there is no reason to think that a less drastic sanction will have any real effect.  
3 Montgomery has simply refused to comply with this Court's discovery orders. As a result of that  
4 refusal, eTreppid's ability to prepare this case for trial has been significantly hampered. Accordingly,  
5 eTreppid respectfully submits that Montgomery's complaint in this matter, as well as his answer to  
6 eTreppid's counterclaims, should be stricken and a default judgment should be entered against  
7 Montgomery.

8  
9 **C. The Court Should Order that Montgomery is Precluded From Asserting Any**  
10 **Claims Where He Has Refused to Provide Discovery Relevant to Those Claims**

11 In the event that this court determines that terminating sanctions are not appropriate, this Court  
12 may still enter an order prohibiting Montgomery from supporting or opposing designated claims or  
13 defenses. Given the nature of the documents that Montgomery has refused to provide, eTreppid  
14 submits that Montgomery should be precluded from making the following assertions:

- 15 • Because Montgomery has refused to provide documents showing any negotiations with  
16 any third party (including Blixseth, Opspring, Sandoval, and AziMyth) for the sale,  
17 license, or other transfer of technology in the fields of data compression, pattern  
18 recognition, object tracking, and anomaly detection, this Court should conclude that  
19 Montgomery, has violated the preliminary injunction by transferring an interest in  
20 eTreppid's technology to a third party.
- 21 • Because Montgomery has failed to provide tax records which may shed light on his  
22 employment status, this court should conclude that Montgomery has admitted to being  
23 an employee of eTreppid from 1998 forward, and the jury should be so instructed at  
24 trial.
- 25 • Because Montgomery has failed to provide any documents describing the subject  
26 technology (such as white papers, marketing materials, etc.) this court should order that  
27 Montgomery is precluded from asserting that he owns the subject technology.  
28

**D. At a Minimum, eTreppid is Entitled to Monetary Sanctions**

Finally, even if this Court concludes that eTreppid is not entitled to issue sanctions or terminating sanctions, this Court should, at a minimum, award eTreppid monetary sanctions arising from Montgomery's failure to comply with this Court's February 21, 2008 order. At a minimum these sanctions should be sufficient to compensate eTreppid for the cost of bringing the present motion for sanctions. Because eTreppid is not aware of what those costs will be (because they include fees associated with drafting a reply brief and attending any hearing on this matter), eTreppid submits that, in the event that the Court orders Montgomery to pay monetary sanctions, the amount of such sanctions should be determined following any hearing on the present motion for sanctions.

**III. CONCLUSION**

For the reasons set forth above, eTreppid respectfully submits that this Court grant the present motion.

Dated: March 19, 2008.

/s/

J. Stephen Peek, Esq. (NV Bar #1758)  
 Jerry M. Snyder, Esq. (NV Bar #6830)  
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*Attorneys for Plaintiff and Cross-Defendant  
 eTreppid Technologies, L.L.C. and  
 Cross-Defendant Warren Trepp*



**PROOF OF SERVICE**

I, Cynthia L. Kelb, declare:

I am employed in the **City of Reno, County of Washoe, State of Nevada**, by the law offices of Hale Lane Peek Dennison and Howard. My business address is: **5441 Kietzke Lane, Second Floor, Reno, Nevada 89511**. I am over the age of 18 years and not a party to this action. I am readily familiar with Hale Lane Peek Dennison and Howard's practice for collection of mail, delivery of its hand-deliveries and their process of faxes.

On March 19, 2008, I caused the foregoing **ETREPPID TECHNOLOGIES, L.L.C. AND WARREN TREPP'S MOTION FOR SANCTIONS** to be:

X filed the document electronically with the U.S. District Court and therefore the court's computer system has electronically delivered a copy of the foregoing document to the following person(s) at the following e-mail addresses:

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Seattle, Washington 98101

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on March 19, 2008.

/s/  
Cynthia L. Kelb

Hale Lane Peek Dennison and Howard  
5441 Kietzke Lane, Second Floor  
Reno, Nevada 89511

**EXHIBIT “1”**

**EXHIBIT “1”**

**LINER YANKELEVITZ SUNSHINE & REGENSTREIF LLP**

1100 Glendon Avenue | 14th Floor | Los Angeles, CA 90024.3503  
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TUNEEN E. CHISOLM  
tchisolm@linerlaw.com  
Direct Dial: 310-500-3499



March 14, 2008

**U.S. MAIL**

Jerry M. Snyder  
Hale Lane Peek Dennison & Howard  
5441 Kietzke Lane, Second Floor  
Reno, Nevada 89511

Re: *Montgomery v. eTreppid* – Case No. 3:06-CV-00056 and consolidated matters

Dear Jerry:

Enclosed are documents (Bates numbered DM 000000888 - 000000906), which are being produced by the Montgomery Parties in connection with the above-referenced matter. Documents Bates numbered DM 000000890- 000000906 are designated "Confidential" pursuant to the Protective Order filed on September 11, 2007, and should be treated accordingly.

Sincerely,

LINER YANKELEVITZ  
SUNSHINE & REGENSTREIF LLP

By   
Tuneen E. Chisolm

TEC:cd

cc: Deborah Klar, Esq.  
Peter Bransten, Esq.  
Carlotta P. Wells, Esq.  
Raphael O. Gomez, Esq.  
Greg Addington, AUSA

**EXHIBIT “2”**

**EXHIBIT “2”**

# HALE LANE

ATTORNEYS AT LAW

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**JERRY M. SNYDER**

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Direct: (775) 327-3017

March 18, 2008

**Via eMail and Regular Mail**


Tuneen Chisolm, Esq.  
Liner Yankelevitz Sunshine & Regenstreif, LLP  
1100 Glendon Avenue, 14th Floor  
Los Angeles, CA 90024-3503

Re: eTreppid Technologies and Warren Trepp adv. Montgomery, et al.  
Our File No.: 20801-0002

Dear Ms. Chisolm:

This will confirm our conversation yesterday regarding Montgomery's production of documents in compliance with the Court's order of February 21, 2008. You have provided a handful of documents, numbered DM 888-906. You stated yesterday that Montgomery did not intend at this time to provide any further documents.

Sincerely,



Jerry M. Snyder

JMS/ck

**HALE LANE PEEK DENNISON AND HOWARD**

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::ODMA\PCDOCS\HLRNODOCS\718071\1

**EXHIBIT “3”**

**EXHIBIT “3”**

## Jerry Snyder

---

**From:** Tuneen E. Chisolm [TCHISOLM@linerlaw.com]  
**Sent:** Tuesday, March 18, 2008 3:41 PM  
**To:** Jerry Snyder  
**Cc:** Deborah A. Klar; Criss Draper  
**Subject:** RE: Letter from Jerry Snyder

Jerry: Per my advisement earlier, I had hoped to provide the information you requested below by close of business today, but cannot, as Deborah is in arbitration all day and thus unavailable.

Regarding any documents provided to the media, there are no hard copy documents that we know of so that production has to await the electronic protocols.

I will let you know about anything else as soon as possible. If you reply to this email, please reply to all. Thanks.

---

**From:** Jerry Snyder [mailto:JSnyder@halelane.com]  
**Sent:** Tuesday, March 18, 2008 12:05 PM  
**To:** Tuneen E. Chisolm  
**Subject:** RE: Letter from Jerry Snyder

Please advise as to (1) what Montgomery intends to produce, and (2) when will it be produced.

If you do not confirm, by the close of business today, that Montgomery will provide all documents that he was ordered, on February 21, 2008 order, to produce on or March 14, 2008, then eTreppid will proceed with a motion seeking sanctions for Montgomery's failure to comply with that order.

---

**From:** Tuneen E. Chisolm [mailto:TCHISOLM@linerlaw.com]  
**Sent:** Tuesday, March 18, 2008 11:56 AM  
**To:** Jerry Snyder  
**Cc:** Cynde Kelb; Deborah A. Klar; Criss Draper; Peter Bransten  
**Subject:** RE: Letter from Jerry Snyder

Jerry:

I send this email in response to your letter sent today, purporting to confirm our telephone conversation yesterday afternoon. You are not correct. You asked whether there was another package of documents on the way, and I told you there was not. I DID NOT say that no further production is intended.

Tuneen E. Chisolm, Esq.  
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3/19/2008



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---

**From:** Cynde Kelb [mailto:ckelb@halelane.com]  
**Sent:** Tuesday, March 18, 2008 11:24 AM  
**To:** Tuneen E. Chisolm  
**Subject:** Letter from Jerry Snyder

Please find attached a letter from Jerry Snyder dated March 18, 2008.

<<Letter to Tuneen Chisolm dated 3-18-08.pdf>>

***Cynde Kelb***

Legal Assistant to Jerry Snyder, Esq. and Rob Smith, Esq.  
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Visit our web site at: [www.halelane.com](http://www.halelane.com)

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